

BITKOM response

Public Consultation on Content Online in the Single Market Juli 2006

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German Association for Information Technology, Telecommunications and New Media e.V.

The German Association for Information Technology, Telecommunications and New Media (BITKOM) represents a total of more than 1,000 companies. Its 800 regular members employ some 700,000 people and generate revenues of 120 billion Euro. They include manufacturers of ICT equipment and providers of software, IT services, telecommunication services and content. BITKOM is working, in particular, to improve the regulatory framework in Germany, for modernization of the education system and for an economic policy which encourages innovation.

BITKOM welcomes the opportunity to express its views on the European Commission's consultation on the creation and distribution of creative content online. Promotion of the innovation necessary to deliver such works and services are among the Community's highest priorities. Therefore, robust intellectual property laws, protection for rights-management technologies, cost-efficient and speedy procedures and remedies, and market-driven innovation that is responsive to consumer demand, are all particularly important as Europe faces increasing competition from all over the world.

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Types of creative content and services online

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1 Do you offer creative content or services also online? If so, what kind of content or services? Are these content and services substantially different from creative content and services you offer offline (length, format, etc.)?

The creative content and services that BITKOM Members offer online can be summarised as follows:

- Online content services such as video-on-demand, music downloads, computer games downloads, public and private TV programmes via mobile networks, games etc.
- Consumer products and services
- Software services

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In particular online services are adjusted to their specific distribution platform.

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2 Are there other types of content which you feel should be included in the scope of the future Communication? Please indicate the different types of content / services you propose to include.

No.

Consumption, creation and diversity of online content

3 Do you think the present environment (legal, technical, business, etc.) is conducive to developing trust in and take-up of new creative content services online? If not, what are your concerns: Insufficient reliability / security of the network? Insufficient speed of the networks? Fears for your privacy? Fears of a violation of protected content? Unreliable payment systems? Complicated price systems? Lack of interoperability between devices? Insufficient harmonisation in the Single Market? Etc.

Basically, the present legal and business framework is for the most part conducive to promote the roll-out and use of creative content online. Prognoses predict a consumer demand for more internet services. This provides ample capital and incentives to improve the communications infrastructure, especially high-speed broadband access networks required for new services to evolve. Online payment systems are well established. Online services provide a much wider variety of market-based usage and options than their offline counterparts.

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Various aspects are of importance:

Intellectual property (IP) rights and enforcement are the sine qua non of vibrant online content services. As in the offline world, IP rights give creators and innovators the market-based incentives and rewards to develop, disseminate and re-invest in new works and services. Interference with these rights, through inappropriate exceptions to protection or non-market pricing rules, or inadequate enforcement rules or practices, simply undermines the needed incentives and rewards.

Security of networks, payment systems and services is also vital. The continued success of the internet is highly dependent in the faith that individuals, business and governments have that they are safe from thieves, hackers and spies. This requires secure technology, which for example BITKOM members maintain as one of the highest priorities in their products and services. It also requires vigilance, awareness, and visible prosecution of lawbreakers.

Mandated interoperability has been raised (e.g. in France) as a solution to consumer concerns about limitations DRM technology places on transferability between devices. Mandating interoperability by regulation or legislation will not resolve this complex problem, and rather is likely to result in some providers leaving markets that require interoperability. Robust competition between DRM enabled services, along with light regulatory regimes that encourage cooperation between makers of DRM systems are the most effective ways governments can encourage greater interoperability. For Example, BITKOM supports any efforts to create reasonable standards for the interoperability of devices relating to online content. However, we do believe that the standardisation is a process which should be run by the players in the market since only those have the necessary know-how to provide for standards sufficient for the technological needs. In the past you can find several examples where the market regulated itself in this way, e.g. in the case of video-tape recorders where the VHS-system prevailed. The inherent right to determine to whom and how to distribute a work belongs to creators of music, films and of DRM software itself; unwarranted regulation of this sort violates creators' rights under EU and international law, and removes incentives to create and improve DRM.

Consumer privacy and copyrights can be fully safeguarded by various different protection systems on software and hardware basis. Of course, any protection system might be overcome by experts. On a day-to-day basis, we do not encounter a significant number of violations.

4 Do you think that adequate protection of public interests (privacy, access to information, etc) is ensured in the online environment? How are user rights taken into account in the country you live / operate in?

There is due regard for maintaining the public interest already built into a whole range of Community and national regulation applicable to the online environment, including

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in the areas of data protection, competition, telecommunication and intellectual property protection. The level of protection of consumer-rights and privacy is already very high, in particular because of several EU-directives¹ and national laws which provide for adequate balance between right holders interests and public interests like access to information. Legislative framework also secures consumer privacy in online environments.

We do not believe that substantive law changes are needed in this important area.

5 How important for you is the possibility to access and use all online content on several, different devices? What are the advantages and / or risks of such interoperability between content and devices in the online environment? What is your opinion on the current legal framework in that respect?

This is a competitive not a regulatory consideration for digital service providers and consumers. Successful, widely implemented and interoperable systems for digital content do exist. However, consumers also may prefer 'end-to-end solution' as can be seen by the success of the apple iPod.

Today devices are designed for different ways of usage. Prognoses for the need of a standardized solution for the accessibility of online-content are hard to find. In principle, the current lack of a "one fits all"-standard is for the good of consumers as it allows to compete on innovations and between different platforms. We feel that the market through consumer preferences shall decide instead of having a regulator making decisions for the consumer. Solutions providing the highest benefit to consumer will then prevail.

6 How far is cultural diversity self-sustaining online? Or should cultural diversity specifically be further fostered online? How can more people be enabled to share and circulate their own creative works? Is enough done to respect and enhance linguistic diversity?

No other medium is fostering cultural diversity more than the Internet. Content creation, particularly in communities or by private persons, has reached a unexpected high volume. When compared to the cost of producing and distributing offline content, the affordability of internet distribution means that much more, and much more diverse, content will be made available than ever before. Since its very beginning the Internet provides a platform for a global cultural exchange, as no other medium did before. Therefore no guardian for ensuring cultural diversity is necessary.

¹ Directive 2001/29/EC of the European Parliament and of the council of 22 may 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, hereinafter "Copyright Directive" and the Directive 2000/31/EC of the European Parliament and of the council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce.

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Also, as the Commission has largely recognised, the mechanisms used to promote linguistic diversity in the closed, limited spectrum, national and 'push' services of traditional broadcasting are simply inapplicable online:²

In the end, consumer demand will determine whether providers of non-linear audiovisual media services will want to offer more local and regional content.

Given the different nature of non-linear services, and the differing degrees of user control, the European Commission has from the outset made it clear that "content quotas" for these services are certainly not the right instrument to achieve cultural diversity, and could even be counter-productive.

So, besides there is no need for legislative action, any form of supply-based restrictions or mandates in the global, unlimited spectrum and 'pull' environment of the internet simply make no sense. We therefore oppose the plan of the Commission to introduce provisions with respect to the promotion of the cultural diversity into the Television-Without-Frontiers-Directive (TVWF).

Competitiveness of European online content industry

7 If you compare the online content industry in Europe with the same industry in other regions of the world, what in your opinion are the strengths and weaknesses of our industry in terms of competitiveness? Please give examples.

After an initial head start in the US, there are now more than 130 online music services in Europe, which is competitive with all regions of the world.³ Online film services are still in their infancy, with the US having a slight head start. Recent announcements by both Amazon and iTunes of major film download services in the US should spark major growth in this area, with similar announcements to be expected in Europe. Many online games and other online content are already available in Europe.

Europe has creative talent and innovative technology and communications expertise that rival any in the world. Its legislative infrastructure has a few gaps:

- extensive private copying and inadequate levy-systems in many copyright laws,
- fragmented and expensive patent protection,

² The Commission Proposal for a Modernisation of the Television without Frontiers Directive: Frequently Asked Questions,
<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/06/208&format=HTML&aged=0&language=EN&guiLanguage=en>.

³ <http://www.pro-music.org/musiconline/tracker-region-europe.htm>.

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- enforcement rules that can be cumbersome in the digital realm, as described below
- government monopoly for operating gambling businesses (Germany)
- broadcasting fees on internet capable PCs (including PDAs) in Germany

that ultimately may weaken its competitiveness vis-à-vis up-and-coming economies such as China, which has begun to take intellectual property very seriously.

Additional reasons for obstacles for the EU online content markets can be seen in a relatively small consumer spending, the less openness of consumers in Europe as opposed to other regions of the world for new technologies and less private investment in content creation (or incentives to do so).

New business models and transition of traditional ones into the digital world

8 Where do you see opportunities for new online content creation and distribution in the area of your activity, within your country/ies (This could include streaming, PPV, subscription, VOD, P2P, special offers for groups or communities for instance schools, digital libraries, online communities) and the delivery platforms used. Do you intend to offer these new services only at national level, or in whole Europe or beyond? If not, which are the obstacles?

Further digitization of content (video and music) will encourage the growth of the digital content market. New forms of online- and mobile advertising are also seen as promising new emerging markets, which will foster via new business models the growth of the content market as a whole. New upload capacities for private users and a growing interest in private content creation will also foster these developments.

Moreover, we do believe that libraries, educational services and virtual communities all have tremendous potential in the online environment. Many of these are and will be available globally. Some, by virtue of language differences, local culture and preferences, will continue to be offered on a country-by-country basis.

9 Please supply medium term forecasts on the evolution of demand for online content in your field of activity, if available.

The online content business will continue its vital growth. In Germany we expect a market volume of € 126.3 Mio. for downloaded songs (not including ring tones) by 2008.⁴ Legal Downloads of movies, TV series and documentaries are supposed to

⁴ Business Software Alliance, DRM Enabled Online Content Services in Europe and the USA, 2005, S.12. www.eicta.org/files/DRMOnlinepdf-100413A.pdf

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generate a market volume of €244 Mio. in 2009.⁵ Turnover of all online content sales in Germany will rise up to approx. €2.6 Billion in 2008.⁶

10 Are there any technological barriers (e.g. download and upload capacity, availability of software and other technological conditions such as interoperability, equipment, skills, other) to a more efficient online content creation and distribution? If so, please identify them.

Modern and area-wide Internet broadband penetration is essential for many future businesses, including online content distribution. Due to suboptimal business environment, some European countries (e.g. Germany) still lack satisfactory broadband penetration.

11 What kind of difficulties do you encounter in securing revenue streams? What should in your view be the role of the different players to secure a sustainable revenue chain for creation and distribution online?

We see some overbroad private copy/levy schemes. For example, despite the increased application of TPMs/DRM-Systems what should lead to a phasing down of levies the collecting society demands for a continuously growing income. Nathan Associates recently completed a Study⁷, which examines how levies on digital equipment undermine consumer purchasing power and reduce digital sales. In the 15 European countries surveyed, the Study concluded that levies currently being applied cost producers nearly €750 million in lost sales revenue (resulting from the higher price and lower unit sales), with a total effect (on producers and consumers) of €2.1 billion in 2005.

Some other problem is authors' collecting societies' licensing practices.

Generally the drain on the return on investment that piracy brings is a burden when distributing content.

Other difficulties arise, when new online distribution platforms models are subject to additional burdensome broadcast regulation or other forms of unproportional regulatory intervention.

⁵ BITKOM Presseinfo vom 17.7.2006 (Quelle: BITKOM, EITO), http://www.BITKOM.org/de/presse/30739_40442.aspx

⁶ BITKOM Presseinfo vom 5.4.2005 (Quelle: EITO), www.BITKOM.org/de/presse/30739_30744.aspx

⁷ <http://www.eicta.org/files/EconomicImpactStudy-193713A.pdf>

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Payment and price systems**12 What kinds of payment systems are used in your field of activity and in the country or countries you operate in? How could payment systems be improved?**

Until recently, credit and bank cards have provided the only workable system to pay for virtually any type of online content. These have worked well for consumers that are adults and own such a card, and in countries where credit or bank card use is widespread such as in the UK, where more than 70% of adults have at least one such card.⁸

Online services have been expanding their offerings and diversifying their payment options over the past couple of years to appeal to a wider audience. Although credit and bank cards remain a relevant means of payment, several major new payment systems are also available: (1) prepaid vouchers or cards, which can be purchased offline with cash or any other payment means; (2) account-based on-line payment systems funded by credit/debit cards and/or bank accounts; (3) online credits that can now be purchased offline or earned online, as well as purchased online; and (4) mobile phone payments or (5) online billing systems where the user has to be registered.

BITKOM members use or offer virtually all kinds of payment options.

From our point of view a variety of payment systems are available meeting consumer demand. We currently see no need for improvement of payment systems. To the contrary it has to be ensured that no undue burdens are placed on electronic payment systems which might render business models non viable or unnecessarily increases costs for consumers.

13 What kinds of pricing systems or strategies are used in your field of activity? How could these be improved?

BITKOM members use a variety of pricing models: pay per use, flat tariffs, subscription etc. New pricing strategies are still evolving.

⁸ See FDS International, Credit Card Survey for the Office of Fair Trading (2004), www.offt.gov.uk/NR/rdonlyres/33277732-EDE6-4DB3-849D-1A0C9032E132/0/oft709.pdf.

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Licensing, rights clearance, right holders remuneration

14 Would creative businesses benefit from Europe-wide or multi-territory licensing and clearance? If so, what would be the appropriate way to deal with this? What economic and legal challenges do you identify in that respect?

Basically, there are two multi-territory licensing systems. One is based on mutual agreements of the respective collecting societies. Beside this model, which originates from the analogue content market, there are digital rights management systems in place, which manage – inter alia via IP geolocation – the use of intellectual property rights in the internal market.

There could be more efficient ways for online licensing instead of the existing monopolistic structure in the administration and management of copyrights by national collecting societies. Creative businesses would benefit from a Europe-wide or multi-territory licensing, when a revised and integrated licensing systems would provide more transparency for the rights-holders and more competition between the collecting societies which in return would benefit rights users.

Europe-wide or multi-territory licensing should be forced because it would stop double licensing in several countries.

The system should include easy access by one single contract with one collecting society (so called one-stop-shop license); efficiency and low administration in royalty collection; fair and non-discriminating share and payment of collected royalties to rights holders.

The US example demonstrates the market potential that can be unlocked by new service providers if sufficient economies of scale provide investment incentives for the creation and distribution of content.

In general terms, licensing should remain at the discretion of the rights owners in the content. Software, publishing, phonogram and even film licensing already can be negotiated centrally for multiple territories.

15 Are there any problems concerning licensing and / or effective rights clearance in the sector and in the country or countries you operate in? How could these problems be solved?

With respect to music authors and composers rights, territory and membership limitations among (primarily Continental) European authors' rights societies have made it difficult for internet-based music services to obtain pan-European rights clearances to date. The system of collective societies rights clearance today does not provide sufficient consumer orientation, efficiency (high transaction costs, no market-

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oriented prizes), transparency (especially administration costs) and willingness for innovation and is far from being harmonised. The system must be reviewed to improve pan-European rights clearance. Licensing is difficult and expensive.

The growing complexity and multi-territory nature of much of the European cable and broadband business does not sit comfortably alongside today's Regulation on Collective Management. The actual clearance system as provided by the 1993 Satellite and Cable Directive (SATCAB) is still organised according to the old market situation where cable only offered analogue TV services. Today cable is rolling out new services like interactive digital TV, offers more TV channels, and deals with an increasing share of international content and different content sources. In this modern environment, the existing copyright clearing system is often a big hurdle to launching and managing new services. Therefore also, a new system needs to be put in place.

We propose a new technology neutral clearance system that is mainly based on two pillars: all-rights included packages for certain businesses (e.g. onward transmission of broadcasting) and a central licensing framework for all copyright users. This system would lead to an increased market efficiency and effectiveness, to competition between the collecting societies and to a fair market value of copyright prices.

In short, this new "All-Rights Included, Central Licensing" system would be organised against the following principles:

- The position of the right holders would be much improved if they could choose between different collecting societies.
- Competition between collecting societies to support the development of fair market prices.
- Moreover, it must be ensured that collecting societies actually own the rights they do license (this causes problems in rights clearance for ring tones in Germany).
- Broadcasters to clear all rights necessary for communication to the public, broadcasters thereby to offer fully cleared packages
- Broadcasters and content providers to have the opportunity to clear all their relevant rights at one organisation of choice at European level.
- Clearing mechanisms to be established to guarantee fair distribution of fees.
- Effective and independent monitoring of collecting societies is necessary.

In this proposed system, content creators would benefit from a better leverage of content rights due to easier cross-boarder collective management. Local and foreign content creators could then be treated on the same level. This system would be beneficial for all parties involved.

A main problem with distributing content online is also what is referred to as "unknown ways of usage". This term refers to the situation where a copyright owner has conferred certain rights (e. g. broadcasting rights) to a provider. In accordance to the concept of unknown ways of use, even slightly different ways of use (e. g. the

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broadcasting via IPTV instead of the analogue TV system) thus not be covered by the conference of rights and thus cause a claim of the copyright owner to prohibit the new (formerly unknown) way of usage. Such a strongly differentiating system of ways of usage has the potential to severely hamper the development of a market for online content.

16 How should the distribution of creative content online be taken into account in the remuneration of the right holders? What should be the consequences of convergence in terms of right holders' remuneration (levy systems, new forms of compensation for authorised / unauthorised private copy, etc.)?

BITKOM believes strongly that right holders must be appropriately compensated for use of their works and that consumers should be charged market-based prices that accurately reflect their uses of a particular work, and that innovation in the digital-rights management (DRM) and DRM-enabled services sectors must be encouraged to implement a whole range of new, competing and market-based usage and compensation models.

Private copying in online environments should not be compensated by copyright levies since it is not justified. In the first place, the right holder can protect his content with TPMs/DRM-Systems. Individual licensing guarantees adequate remuneration. In case private copying is done disrespecting the right holders protection measures, the copying is a piracy act. As a matter of fact, copyright levies do not compensate piracy acts. In case the right holder does not use TPMs/DRM-Systems, he allows usage for free, thus offer open content by his own decision (may be suitable for promotion/marketing). As a consequence a compensation by copyright levies wouldn't be justified.

Private copy and levy schemes provided 'rough justice' compensation for the analogue private copying (of unprotected formats) of the past, and are not needed in the online world. Digital distribution, with the availability of DRM, enables creators to offer consumers a variety of product and service 'packages' that include a range of private copying permissions. For example a song may be available for use on a limited number of devices on a rental basis for so long as a consumer pays a monthly fee. If consumers prefer a model where they have permanent rights to use the content, they might purchase and download that song at a higher price. In either case, the consumer has elected to pay a particular price to purchase a specific amount of private copying. Secure digital distribution enables direct bargaining between copyright owners and consumers for private copying and many other types of usage.

By implying greater 'rights' to copy than the consumer has actually bargained for, levy systems simply undercut the new market-based online bargains, rendering some business models impossible and others less viable and less attractive. This would simply undermine the very usage and pricing flexibility that the digital revolution was

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meant to promote, and promote a return to the monolithic one-size-fits-all content offerings of the past. Non-market levy systems simply must be phased out.

Legal or regulatory barriers

17 Are there any legal or regulatory barriers which hamper the development of creative online content and services, for example fiscal measures, the intellectual property regime, or other controls?

The legal and regulatory barriers which undermine the development of a healthy market in online content and services are principally as follows:

1. Inadequate regulatory regimes on new services.
 - Obligations designed to preserve a wide range of opinions and cultural diversity can only be justified if technical or market-related restrictions are hindering a diverse offering. Moreover, it should be made clear that pure bundling, transmission or reselling of content for which third parties bear the editorial responsibility as media service providers can not be included in the scope of any future directive, e.g. TVWF-Directive. As providers have no influence on and therefore no control over such content such a clarification is necessary. We consider that such a new regulation would constitute a great barrier to the development of nascent content online services.
2. Inadequate copyright rules and Levy-Systems. This includes:
 - Overbroad private copy regimes, which sometimes treat widespread unauthorised downloads (or even uploads) from illegal sources as legitimate (see above question 16).
 - Problems with pan-European rights clearance (see above question 15)
 - Member State legislation that does not adequately implement the letter and spirit of the Community's directives in the copyright area. Member States' implementing laws need careful review for non-compliance with this directive.
 - Imposing a copyright levy on digital equipment could delay the transition to digital television and slow down massive investments in new services.
3. Inadequate protection and support for digital rights management (DRM) technology.
 - failure to protect all forms of DRM effectively (e.g. access and copy controls as required by the EU Copyright Directive)
 - unjustified interference with or expropriation of DRM technology
4. Inadequate IP enforcement rules:
 - Criminal-sanctions can be improved, thus being more useful in criminal anti-counterfeiting cases. BITKOM will be glad to participate in future discussions regarding detailed aspects.
 - Improvements in the civil enforcement regime:

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- Damages. Damage awards must deter infringement, according to the WTO TRIPs Agreement. At least, infringers should not be able to keep any profits from infringement, nor to pay any less in compensation than they would have paid if they had purchased or licensed the material legitimately. In special cases (e.g. infringements done wilfully and with commercial purposes) it should be possible to set compensation at double of current damages or of the royalties or fees which would have been due if the infringer had requested authorisation to use the intellectual property right in question.
 - Claim of licence. Apparent infringers who claim that their activities were licensed should be required to produce and serve on the intellectual-property right owner a copy of any purported licence in order to be able to raise such a defence in enforcement proceedings.
5. Liability regime for online content
- When it comes to liability of Internet Provider, not all Member States do adequately implement the letter and spirit of the Community's directives.
 - The new market for online content, distributed on an IP-technology basis, is characterized by the fact, that we see not only a handful, but a huge amount of content providers - partly commercial, partly private -, using a broad variety of service providers offering hosting, searching or guiding functionalities. This characteristic division of labour needs a special legal regime for clearly allocating responsibilities for the respective contents. The need for limited liability of technical service providers is already recognized and included in the eCommerce directive (2001/31/EC) for hosting and access providing, but specific regulation regarding search providers, hyperlinks and content guides is missing. Moreover, implementation of the existing liability regime in member state laws varies widely and judicature in several member states tends to apply those liability limitations very restrictively, thus creating wide-reaching monitoring obligations.
 - This judicature is not only inconsistent with the spirit and wording of the eCommerce directive; it also causes massive problems for the affected host providers, because it's hardly possible to fulfil those obligations in systems that essentially rely on an automated data processing. These tendencies, affecting not only host providers, but also search engines, location tools etc. with comparably automated procedures, endanger the whole development and growth opportunities of the internet, as we know it today.
 - Therefore, BITKOM sees a relevant need for clarifying and strengthening the liability provisions of the eCommerce directive to ensure that the online content industry can realize its full economic potential. To reach a fair balance of all interests involved and to ensure a high level of protection for intellectual property rights it might be worth considering to introduce a Notice-and-

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Takedown procedure⁹ into European law, as we know it for example for copyright issues in the US law (DMCA).

6. Inadequate and overly expensive patent protection.
 - Need to reduce number of language translations required for Europe-wide patent protection. London Agreement, a protocol to the European Patent Convention that would help in this regard, should be ratified by all Member States. This has also been the major barrier to date to industry support for a Community Patent.
 - Need to reduce patent litigation cost and increase litigation certainty. The European Patent Litigation Agreement, another proposed EPC protocol that would establish a unitary Europe-wide patent appeal court would be a major improvement.
 - A Community Patent to provide a system that unlike the March 2003 approach would improve affordability and legal certainty, should be worked on.
 - Need not to criminalise patent infringement. While we would generally like to see improvements to the proposed EU criminal sanctions directive, we do not think that criminalising patent infringement is either needed or warranted.
 - Possible tax credits or other measures to make patent protection more affordable and accessible for SMEs.

18 How does the country you mainly operate in encourage the development of creative online content and services?

BITKOM members operate in a lot of countries in the world. In Germany, a broad array of public and private tools for encouraging the development of creative online content is provided. This encompasses fiscal measures, venture capital, educational initiatives like specified university programmes etc. In addition to these aspects, other EU Member States are following a demand-supported policy by offering fiscal incentives for purchasing ICT equipment. Some EU Member States expressly exclude Personal Computers or other modern IT equipment from copyright-levies not to hinder the distribution of online content.

The markets most conducive to the development of creative online content and services have an educated and innovative workforce, effective intellectual property protection and enforcement, a good telecommunications infrastructure, a taxation and fiscal system that encourages rather than penalises success, and a light regulatory regime.

⁹ For detailed information and proposals see BITKOM, Stellungnahme zum Thema Rechtsdurchsetzung im Internet im Rahmen des zweiten Korbs der Urheberrechtsreform, 26.4.2004, www.bitkom.org/files/documents/Stellungnahme_Rechtsdurchsetzung_im_Internet__26-04-2004.pdf

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Release windows

19 Are “release windows” applicable to your business model? If so, how do you assess the functioning of the system? Do you have proposals to improve it where necessary? Do you think release windows still make sense in the online environment? Would other models be appropriate?

‘Release windows’ – which typically refers to the phased roll-out of cinema and video releases in individual countries and across geographic regions – is not applicable in the software, music and some other businesses. International copyright and trade treaties do give copyright owners the right to decide whether, when, where and how to release and distribute their products – an important right that should be maintained in the digital age.

Networks

20 The Internet is currently based on the principle of "network neutrality", with all data moving around the system treated equally. One of the ideas being floated is that network operators should be allowed to offer preferential, high-quality services to some service providers instead of providing a neutral service. What is your position on this issue?

Piracy and unauthorised uploading and downloading of copyright protected works

21 To what extent does your business model suffer from piracy (physical and/or online)? What kinds of action to curb piracy are taken in your sector/field of activity and in the country or countries you operate in? Do you consider unauthorised uploading and downloading to be equally damaging? Should a distinction be made as regards the fight against pirates between “small” and “big” ones?

As BITKOM members distribute all various kinds of content, and an increasing part of their businesses is dependent on the protection of intellectual property rights. Infringements of these rights cause major harm to these companies.

In the software sector, the industry estimates that 35% of business software in use worldwide (from offline and online sources) is infringing, at a value of approximately \$34.3 billion—\$11.8 billion in Western Europe alone.¹⁰ The games-software sector

¹⁰ Third Annual BSA and IDC Global Software Piracy Study, May 2006, <http://www.bsa.org/globalstudy/upload/2005%20Piracy%20Study%20-%20Official%20Version.pdf>.

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estimates its worldwide losses from piracy at €2.5 billion, not including online piracy.¹¹ Each other content-specific sector publishes piracy statistics annually.

Unauthorised uploading and downloading are two sides of the same coin – an unauthorised (and hence infringing) distribution and reproduction of someone else's copyrighted content in the same transaction. Indeed, some peer-to-peer technologies make a downloader into an uploader the second her or she downloads a file. While we are pro-technology and embrace the promise of new technologies like peer-to-peer networking for legitimate purposes, these must be used responsibly and in compliance with copyright and other laws.

The essential question is not whether a pirate is 'small' or 'big', but whether the law has been broken and the scale of the infringement. Given that there are nearly 1 billion internet users worldwide, and that perfect copies of copyrighted works can be distributed online quickly and massively around the world, the level and damage of online infringement can be every bit as serious (truly on a 'commercial scale', regardless of motivation) as the worst physical piracy cases. Exceptions for "small" pirates would also weaken the consumers attitude towards intellectual property.

22 To what extent do education and awareness-raising campaigns concerning respect for copyright contribute to limiting piracy in the country or countries you operate in? Do you have specific proposals in this respect?

Information-technology industry associations like BITKOM, as well as other associations and also the government, conduct regular anti-piracy awareness campaigns. This includes information on how to use intellectual property legally. We view these as vital for making the public aware of legitimate products and services, promoting respect for copyright, and deterring illegal use of copyright material. Some BITKOM members provide practical information for consumers on their own websites about copyright, licensing and piracy. Education and awareness are vital for intellectual property. Nevertheless we are of the opinion that the national government as well as the EU must amplify their efforts to push public awareness on this issue.

¹¹ Interactive Software Federation of Europe, PIRACY AND COUNTERFEITING, [http://www.isfe-eu.org/index.php?PHPSESSID=6bff74df1db25ec3483ca2dec919c228&template\[0\]=matrice.html&template\[1\]=rubrique.html&oidit=T001:a31bfad925b6f3ba0336731398e36fef](http://www.isfe-eu.org/index.php?PHPSESSID=6bff74df1db25ec3483ca2dec919c228&template[0]=matrice.html&template[1]=rubrique.html&oidit=T001:a31bfad925b6f3ba0336731398e36fef) .

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23 Could peer-to-peer technologies be used in such a way that the owners of copyrighted material are adequately protected in your field of activity and in the country or countries you operate in? Does peer-to-peer file sharing (also of uncopyrighted material) reveal new business models? If so, please describe them?

Any technology, including peer-to-peer technology, can be used in such a way that the owners of copyright material are adequately protected. The key is the effective use of DRM and other technologies that allow rights owners to communicate terms of use, to determine how their content is delivered, accessed and used, and to collect payment for such use. This gives right owners the confidence to make their most valuable material available in digital form in a whole range of delivery systems.

Rating or classification

24 Is rating or classification of content an issue for your business? Do the different national practices concerning classification cause any problem for the free movement of creative services? How is classification ensured in your business (self-regulation, co-regulation)?

The German legal protection for minors works satisfactorily. In particular, the principle of classification of movies for different ages via self control bodies, the legal harmonisation of broadcasting services and new media, the procedural design of co-regulation and the implementation of content-rating systems, which allow a proactive selection of appropriate content, are appropriate and effective.

Very different cultural and philosophical considerations apply from country to country in evaluating such content as music and films, however, which would make EU-wide systems very difficult to develop and implement.

Digital Rights Management systems (DRMs)

Digital Rights Management systems (DRMs) involve technologies that identify and describe digital content protected by intellectual property rights. While DRMs are essentially technologies which provide for the management of rights and payments, they also help to prevent unauthorised use.

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25 Do you use Digital Rights Management systems (DRMs) or intend to do so? If you do not use any, why not? Do you consider DRMs an appropriate means to manage and secure the distribution of copyrighted material in the online environment?

BITKOM members are users of rights-management technology in many of their products and services, as well as developers of DRM technologies for others to use. DRM copyright protection works successfully and is well accepted among the partners of online content businesses.

1. DRM is the cornerstone of the digital marketplace. Digital rights management (DRM) technology empowers music, film and other rights owners to manage their digital content and protect it from unauthorised use. DRM gives right owners the confidence to make their most valuable material available in digital form. The explosive growth of digital music and media services is strong evidence that both copyright owners and consumers like the new products and services that DRM has enabled. Legal Downloads of movies, TV series and documentaries are supposed to generate a market volume of 244 Mio. Euro in 2009.¹² Turnover of all online content sales in Germany will rise up to approx. 2,6 Billion Euro In 2008.¹³ DRM is the essential precondition for the growth of online content markets.
2. Much has been said about DRM not being perfect and that that every protection measure may be broken under certain circumstances. Therefore, one needs to keep in mind that this is nothing new with the online world. Also in our offline world, we have different levels to protect property. And as we know today, with different efforts every protection measure (from a padlock to a bank safe) may be broken. In offline and online world, it is the balance between certain aspects (costs, value of protected goods etc.) that determine the level of protection measures. That DRM may be broken und certain circumstance does not mean that DRM doesn't work.
3. Without question, licensing models through digital sales provide "better" remuneration of right holders then the levy-system does (see BITKOM Stakeholder Consultation on Copyright Levies in a Converging World, 14.06.2006¹⁴). Phasing out of the levy-system and strengthening of DRM-enabled distribution and remuneration needs to be fostered.
4. The Copyright Directive anticipates this development and requires that copyright-levies be adjusted to reflect the application of DRMs. Unfortunately, however, not all Member States have implemented this obligation. To ensure compliance with the Copyright Directive's mandate, levies should not be applied to products where the copying mode, or – in the case of a device having more than one

¹² BITKOM Presseinfo vom 17.7.2006 (Quelle: BITKOM, EITO), http://www.BITKOM.org/de/presse/30739_40442.aspx

¹³ BITKOM Presseinfo vom 5.4.2005 (Quelle: EITO), www.BITKOM.org/de/presse/30739_30744.aspx

¹⁴ http://www.BITKOM.org/de/themen_gremien/37144_40528.aspx

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copying mode – each copying mode, is protected by a technological protection measure.

5. With levies on top of existing DRM systems (in digital environment), legal users have to pay for other users who act illegally; the price to access fast Internet technologies would increase to the disadvantage of the European consumer and this would hamper the development of new services as targeted in the Lisbon Agenda. Today's digital multi-function devices perform a much broader range of tasks and are the gateway for consumers to exploit the digital economy's potential. Hampering the roll out of these devices with levies designed for a simpler technology environment is an inappropriate policy response to copyright remuneration issues that are adequately dealt with via DRM technologies.
6. Furthermore, the introduction of a 'broadband levy' as being discussed in several Members States would furthermore pose a serious threat to the considerable investment network operators are undertaking to digitalise their networks. Furthermore, proposals for a 'broadband levy' are bad public policy. It would legitimate online piracy. Indeed, users already often mistake levies — which are compensation for lawful private copying only — for an open license to copy content freely. Infrastructure levies will support this misinterpretation. Such levies are also inefficient, as they would force the many legal users to pay for users who act illegally. Next to this, they would increase the cost of access to online services, thus slowing the growth of Europe's Information Society. In particular we believe such new levies would hamper the penetration of broadband in particular in those countries which have a low cable broadband penetration in comparison with alternative infrastructures. This approach would be wholly inconsistent with the Community's Lisbon objectives. Again, DRM technologies provide for adequate remuneration.
7. The full potential of IP platforms is just starting to be realized with the offering of IP based TV services. It enables a whole new range of interactive TV services. In the upcoming years, the importance of IP based TV (IPTV) technology is expected to gain ground compared to classic TV distribution platforms. By the end of 2010, fully integrated, IP based network platforms are expected to establish themselves as the market standard. PVRs (Personal Video Recorder) and EPGs (Electronic Program Guide) already indicate that first milestones regarding the trend towards TV with comprehensive interactive features. However, IPTV goes far beyond just having a PVR in the living-room: It seamlessly merges "lean back" consumption and interactive, thus offering a whole new style of TV consumption. Attractive product features might include:
 - Transmission of manifold digital channels, e.g. small niche channels,
 - Full Video-on-Demand (VOD) including large video libraries,
 - Extensive TV programming from the Internet to the TV screen,
 - Virtual channels, which allow for rewind and forward within a television program ("Timeshift TV"),
 - Interactive television (betting / voting, additional info, etc.),

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- Provision of additional information to actual TV program in the form of video, audio and text.

Given the above, we consider that any levy on either digital equipment or the broadband access as such would influence the roll out and provision of new content services. Unlike levies, DRM based remuneration will foster the IP-based content businesses. So, DRMs are indeed an appropriate means to manage and secure the distribution of copyrighted material in the online environment.

26 Do you have access to robust DRM systems providing what you consider to be an appropriate level of protection? If not, what is the reason for that? What are the consequences for you of not having access to a robust DRM system?

BITKOM members offer robust systems offering levels and options for protection suitable for all kinds of online content services. Any content or service provider can get access to and implement DRM systems that are adequate (sufficient level of protection) for their purposes. Licensing conditions are acceptable and are working well in practice.

27 In the sector and in the country or countries you operate in, are DRMs widely used? Are these systems sufficiently transparent to creators and consumers? Are the systems used user-friendly?

DRM systems are used in virtually every country by rights owners of business and entertainment software, to music, films, text and all other kinds of digital content. There is a wide variety of such systems available, with a whole range of features that can be configured depending on the content or service provider's business model and the bargain struck between that provider and the consumer. Virtually all of the systems in use are transparent and user friendly.

28 Do you use copy protection measures? To what extent is such copy protection accepted by others in the sector and in the country or countries you operate in?

There is not a universally accepted definition of 'copy protection' measures. 'Rights management' or 'digital rights management' describes the universe of technologies that allow the rights owner or service provider to determine what usage options are available to the consumer. Copying is one of the content provider's rights that may be licensed or prohibited at its discretion, and there are a range of technologies that prohibit or deter unauthorised copying. Different protections correspond to different business models. For example inexpensive "single-use" licenses for online content will come along with more restrict protection measures, while other models may allow a

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wider range of usage. Marketing purposes may lead to different, more sophisticated licensing models. It is consumers demand and competition that determine different business models with different protection measures. Copy protection measures are widely used by BITKOM members and accepted by their customers.

29 Are there any other issues concerning DRMs you would like to raise, such as governance, trust models and compliance, interoperability?

1. Interference with DRM undermines the security of the digital marketplace.
2. DRM enables creators to be directly compensated for private copying, that way providing a better remuneration than the levy-system. Unfortunately, at practical level, the use of DRM is not taken into consideration satisfactorily when assessing copyright levies. Some member states have not even transposed corresponding article 5.2 (b) of the Copyright Directive into national law.
3. The inherent right to determine to whom and how to distribute a creation belongs equally to creators of music, of movies, and of DRM software. Unwarranted regulation of DRM violates creators' rights under EU and international law.
4. Creating DRM is costly and difficult. Regulation removes economic incentives to create and improve DRM, inhibiting the development of an efficient market that balances the needs of all.
5. Consumer choice and industry-led co-operation, rather than regulation, are the best ways to promote a rich digital marketplace that includes interoperability options. It needs to be stressed that the application of DRM systems reflects a particular business agreement in order to meet customer needs.
6. Even if a standardized DRM would support the uptake of the digital content market, it would run the risk to hinder competition for new innovative DRM solutions. The DRM market works well and we do not see a need for regulatory intervention.
7. Inadequate protection for digital rights management (DRM) technology is a concern. This largely involves the failure to protect all forms of DRM effectively (e.g. access and copy controls as required by the EU Copyright Directive), or unjustified interference with or expropriation of DRM technology.

Complementing commercial offers with non-commercial services

30 In which way can non-commercial services, such as opening archives online (public/private partnerships) complement commercial offers to consumers in the sector you operate in?

Digital libraries and archives are an important development for the maintenance of, access to and spread of cultural content and knowledge world-wide. Much that is

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being digitised is a wealth of out-of-copyright material from previous centuries. With respect to copyright materials, it is important that all digital library and similar efforts fully respect copyright and other rights of content owners, proceed only on the basis of consensual licences with the rights owners, and avoid infringements and other interference with the normal commercial exploitation of the works. Public private partnership should not disturb competition in the online content markets.

What role for equipment and software manufacturers?

31 How could European equipment and software manufacturers take full advantage of the creation and distribution of creative content and services online (devices, DRMs, etc.)?

European equipment and software manufacturers already play a significant part in the global market for products, equipment, technologies and services related to online content. They participate in major consortia, standards bodies and design teams. Equipment and software manufacturers will take full advantage, when there is level playing field for all stakeholders within Europe. This encompasses the regulatory framework, freedom for innovation and access to venture capital.

What role for public authorities?

32 What could be the role of national governments / regional entities to foster new business models in the online environment (broadband deployment, inclusion, etc.)?

As content products often also have a cultural aspect there is a tendency of national governments to promote cultural diversity by regulation, this way also protecting local media markets. But as mentioned above, no other medium is fostering cultural diversity more than the Internet. At current stage national governments should follow a regulatory hands-off approach leaving as much as possible to self-regulation in order to give time and room for a public debate on new answers to new global challenges.

Governments should concentrate on:

- Provide effective copyright protection and enforcement regimes
- Provide efficient, affordable and accessible patent systems
- Eliminate non-market pricing regimes (private copy/levy regimes that undermine new online business models)
- Protect digital rights management technology robustly
- Let the market work to compete and provide consumers with a rich variety of new means and options to enjoy content online

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- foster broadband deployment, which can be done by appropriate changes to the regulation of communications infrastructure and services
- educate consumers about intellectual property, copyright systems, national levies regimes etc.

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33 What actions (policy, support measures, research projects) could be taken at EU level to address the specific issues you raised? Do you have concrete proposals in this respect?

Legislation at the EU level is largely adequate to promote the development of online content services, as evidenced by the explosive growth in this area to date.

As described above, the Community should insist on faithful implementation of copyright and DRM rules from the copyright directive, promote affordability and access to the patent system, and improve the civil and criminal enforcement regime (but not criminalise patent infringement).

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Room for improvement can also be seen in the field of collecting societies and in establishing mechanisms for independent review of these societies: Users must be in a position to contest tariff amounts and to receive a fair and balanced hearing of their claims. Each Member State with a levies regime should establish an independent forum to review collection societies. These independent fora should be supported by an EU-level oversight body, open to participation by all stakeholders.